Law Enforcement Digest

September 1997

HONOR ROLL

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463rd Session, Basic Law Enforcement Academy - May 6th, 1997 through July 29th, 1997

President:	Mark A. Plumberg - Island County Sheriff's Office
Best Overall:	Mark A. Plumberg - Island County Sheriff's Office
Best Academic:	John E. Galle - Sumner Police Department
Best Firearms:	Michael D. Blake - Colville Tribal Police Department
Tac Officer:	Tom Furrer - Lacey Police Department
Asst. Tac Officer:	J.R. Hall - King County Department of Public Safety

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Corrections Officer Academy - Class 254 - June 27th, 1997 through July 25th, 1997

Highest Overall:	Melissa Jayne Gantz - Washington Corrections Center for Women
Highest Academic:	Patricia L. Schrum - Washington Corrections Center
Highest Practical Test:	Ingrid Jean Reitz - Washington Corrections Center for Women
Highest in Mock Scenes:	Terry Lee Serpa - Washington Corrections Center
Highest Defensive Tactics:	Gina Rochell Miller - Twin Rivers Corrections Center

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LEGISLATIVE ENACTMENTS – PART THREE

LED EDITOR'S INTRODUCTORY NOTE: This is the third and final part of our update of 1997 Washington State legislative enactments of interest to law enforcement. At page 5 below, we have provided an index of the 1997 enactments addressed in Parts One (July), Two (August), and Three (September).

We have tried to incorporate RCW references in our summaries, but where new sections or chapters are created, the State Code Reviser must assign appropriate code numbers, a process that likely will not be completed until early fall. As always, we remind our readers that any legal interpretations that we express in the LED are those of the Editor alone, and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

PERSONAL COMBAT EVENTS: BOXING, KICKBOXING, MARTIAL ARTS, WRESTLING

CHAPTER 205 (SB 5754) Effective Date: July 27, 1997

Significantly overhauls many sections in chapter 67.08 RCW providing for DOL's regulation of personal combat "events" involving boxing, kickboxing, martial arts, and wrestling. Among other enforcement provisions is section 22 which provides that the acts of engaging in certain practices and conducting certain events without a license constitute gross misdemeanors.

REVISITING CHILD WITNESS ADDRESS CONFIDENTIALITY

CHAPTER 283 (SB 5538) Effective Date: July 27, 1997

In the July 1997 LED at page 12, we addressed this 1997 act which requires that law enforcement give qualified confidentiality protection to the addresses of juvenile witnesses on "violent crimes, sex crimes, or child abuse." We revisit this act this month to address a concern raised about how this act could impact information that officers may write on the reverse side of criminal citations.

The reverse side of the Uniform Complaint Citation Form leaves space for officers to include additional information about the crime with a specific block for witness information. For those agencies whose officers use such forms and file them directly with the court to charge criminal matters (presumably misdemeanors and gross misdemeanors), there is a concern under chapter 283.

Because such citations are open to public review, inclusion of juvenile witness addresses on the form arguably is contrary to the 1997 act unless done with permission. Officers and agencies to whom this discussion may apply should consult their respective prosecutors, city attorneys, or legal advisors.

ELECTRIC-ASSISTED BICYCLES

CHAPTER 328 (SB 5968) Effective Date: July 27, 1997

Amends RCW 46.04 of the traffic code to add a definition of "electric-assisted bicycle" reading as follows:

> "Electric-assisted bicycle" means a bicycle with two or three wheels, a saddle, fully operative pedals for human propulsion, and an electric motor. The electric-assisted bicycle's electric motor must have a power output of no more than one thousand watts, be incapable of propelling the device at a speed of more than twenty miles per hour on level ground, and be incapable of further increasing the speed of the device when human power alone is used to propel the device beyond twenty miles per hour.

Amends RCW 46.16.010 to clarify that no driver's license is required to operate an electric-assisted bicycle. Amends RCW 46.37.500 to provide in part as follows:

> No person may drive a motorcycle or a motor-driven cycle unless such person has a valid driver's license specially endorsed by the director to enable the holder to drive such vehicles, nor may a person drive a motorcycle of a larger engine displacement than that authorized by such special endorsement or by an instruction permit for such category. However, a person sixteen years of age or older, holding a valid driver's license of any class issued by the state of the person's residence, may operate a moped without taking any special examination for the operation of a moped. No driver's license is required for operation of an electric-assisted bicycle if the operator is at least sixteen years of age. Persons under sixteen years of age may not operate an electric-assisted bicycle.

[Underlining shows new language]

Amends RCW 46.37.530 to clarify that persons operating electric-assisted bicycles must comply with bicycle helmet laws. Amends 46.61.710 as follows:

> (1) No person shall operate a moped upon the highways of this state unless the moped has been assigned a moped registration number and display a moped permit in accordance with the provisions of RCW 46.16.630.
>
> (2) Notwithstanding any other provision of law, a moped may not be operated on a bicycle path or trail, bikeway, equestrian trail, or hiking or recreational trail.
>
> (3) Operation of a moped or an electric-assisted bicycle on a fully controlled limited access highway or on a sidewalk is unlawful.
>
> (4) Removal of any muffling device or pollution control device from a moped is unlawful.
>
> (5) Subsection (1), (2), and (4) of this section do not apply to electric-assisted bicycles. Electric-assisted bicycles may have access to highways of the state to the same extent as bicycles. Electric-assisted bicycles may be operated on a multipurpose trail or bicycle lane, but local jurisdictions may restrict or otherwise limit the access of electric-assisted bicycles.

[Underlining shows new language]

DISCLOSURE OF INFORMATION CONCERNING MANDATORY HIV TESTING OF STATE, AND LOCAL INCARCERATED OFFENDERS/DETAINEES; DUE PROCESS ENHANCEMENT FOR AT-RISK WORKERS REQUESTING OFFENDER/DETAINEE TESTING

CHAPTER 345 (SHB 1650) Effective Date: July 27, 1997

Section 1 declares a two-pronged legislative intent: (1) that results of mandatory HIV tests on state or local correctional detainees conducted pursuant to RCW 70.24.340(1), 70.24.360, or 70.24.370 be disclosed to appropriate administrators, who in turn are to disclose, through a licensed health care provider, such results to state DOC or local jail staff "who have been substantially exposed to the bodily fluids" of an offender or detainee; and (2) to protect

confidentiality of HIV test results where such tests on offenders or detainees have been conducted solely pursuant to "voluntary and anonymous" testing.

Section 2 amends RCW 70.24.105 to effectuate the intent provision of subsection (1) as summarized above.

Section 3 amends RCW 70.24.340 to impose time lines and certain other enhancements to the due process provisions allowing certain categories of at-risk workers to request mandatory HIV testing of certain high-risk offenders. Among the changes is an amendment to subsection (4) so that it now reads as follows:

> A law enforcement officer, fire fighter, health care provider, health care facility staff person, department of corrections' staff person, jail staff person, or other categories of employment determined by the board in rule to be at risk of substantial exposure to HIV, who has experienced a substantial exposure to another person's bodily fluids in the course of his or her employment, may request a state or local public health officer to order pretest counseling, HIV testing, and posttest counseling for the person whose bodily fluids he or she has been exposed to. If the state or local public health officer refuses to order counseling and testing under this subsection, the person who made the request may petition the superior court for a hearing to determine whether an order shall be issued. The hearing on the petition shall be held within seventy-two hours of filing the petition, exclusive of Saturdays, Sundays, and holidays. The standard of review to determine whether the public health officer shall be required to issue the order is whether substantial exposure occurred and whether that exposure presents a possible risk of transmission of the HIV virus as defined by the board by rules. Upon conclusion of the hearing, the court shall issue the appropriate order. [Specific 1997 changes not shown here]

Section 4 and 5 add new sections to chapters 72.09 and 70.48 RCW, respectively, to require that DOC and local jail administrators develop and implement policies and procedures for the uniform distribution of "communicable disease" (as broadly defined under this act) prevention guidelines to at-risk staff.

Section 6 requires that the state Department of Health and DOC each adopt rules to implement this 1997 act. In cooperation with local jail administrators, each of these state agencies is also required to report to the Legislature by January 1, 1998 on: (1) changes in state and local policies and procedures to implement the act; and (2) the number of times that DOC or local jail staff were informed that an offender or detainee had an STD or other communicable disease.

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WASHINGTON STATE COURT OF APPEALS

AIR FORCE SECURITY OFFICER HELD TO BE "LAW ENFORCEMENT OFFICER" FOR PURPOSES OF IMPLIED CONSENT LAW AS UNDEFINED TERM GETS A BROAD READING

Williams v. DOL, 85 Wn. App. 271 (Div. II, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Williams was stopped at the gate of McChord Air Force Base in a routine check of every vehicle for the proper identification for entry. After stopping Williams, the sentry at the gate noted the smell of alcohol on Williams's breath and called for an Air Force security officer. Officer Perry, upon arrival at the gate, asked Williams to step out of his car. Officer Perry observed that Williams had difficulty walking, slurred speech, and bloodshot eyes. Officer Perry administered several field sobriety tests, all of which Williams failed. Officer Perry placed Williams under arrest.
>
> Officer Perry asked Williams to submit to a breathalyzer test, advising him that he had the right to refuse and informing him of the consequences of such a refusal under both federal and Washington State Department of Licensing. Williams refused to take the breath test. Pursuant to federal regulation, Officer Perry executed a sworn report of Williams' failure to submit to the breathalyzer test and sent the report to the Washington State Department of Licensing. The Department revoked Williams's Washington driver's license. Williams appealed the Department's decision, and a de novo trial was held in Pierce County Superior Court on March 16, 1995. The trial judge affirmed the Department's decision.

ISSUE AND RULING: Was the military security officer both a "law enforcement officer" and an "arresting officer" for purposes of the implied consent statute? (ANSWER: Yes) Result: Affirmance of Pierce County Superior Court decision affirming DOL's revocation of Hobart Kurtis Williams's driver's license.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Williams contends that the federal security officer who stopped him was not a "law enforcement officer" or "arresting officer" within the contemplation of the implied consent statute, and thus the Department of Licensing did not establish jurisdiction for its revocation of his driver's license. [RCW 46.20.308] has been interpreted to mean that the sworn report of a law enforcement officer is a jurisdictional prerequisite to the Department's administrative authority to revoke a licensee's driving privilege.
>
> The terms "law enforcement officer" and "arresting officer" are not defined in RCW 46.20 or in the general definitions of RCW 46. The term "law enforcement officer,

" given its plain meaning, includes any officer empowered to enforce the law. If the implied consent statute were intended to be restricted to Washington law enforcement officers, it would say so. In addition, it was Officer Perry's uncontroverted testimony that he was empowered to enforce Washington traffic laws and had the power to arrest. Officer Perry was trained by the Washington State Patrol to operate the BAC Verifier Data-Master and used the Washington rights and warnings form to inform Williams of his rights. Officer Perry did in fact arrest Williams. Thus, Officer Perry fits within the plain meaning of "law enforcement officer." Williams's attempt to use the definition of "peace officer" in RCW 10.93 to define "law enforcement officer" is inappropriate and not helpful because neither statute references the other and the terms are not identical. Officer Perry was a "law enforcement officer" for purposes of RCW 46.20.308.

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals makes the following additional rulings : (1) through it is federal property, McChord Air Force Base is "within this state" for purposes of the implied consent statute; (2) double jeopardy does not bar license suspension proceedings following a drunken driver's criminal prosecution; (3) neither the Washington Constitution (article 1, section 7) nor the U.S. Constitution (Fourth Amendment) prohibits stopping and checking for ID all persons approaching a check point gate at a military base; and (4) the smell of alcohol on Williams's breath was sufficient justification for the security officer to detain him for investigation of DUI.

EMERGENCY JUSTIFIES ENTRY OF UNRESPONSIVE DRUGGER'S MOTEL ROOM; CONSENT SCOPE NOT EXCEEDED IN VIDEO REVIEW; NO DOUBLE JEOPARDY VIOLATION

State v. Davis, 86 Wn. App. 414 (Div. II, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

According to Laura Cochran, the manager of a Lacey motel, Davis checked into her motel under the name "Shad Bruce" sometime between 11:00 P.M. on October 22 and 7:00 A.M. on October 23, 1993. Although the motel check-out time was 12 noon and there was a notice to this effect on the front desk, Davis paid his bill for the evening of October 23 between 3:00 P.M. and 11:00 P.M. that day; he paid for the evenings of October 24 and 25 between 3:00 P.M. and 11:00 P.M. on October 25. He continued to occupy the room until his arrest in the early afternoon of October 26.

Davis was not a model guest. Motel personnel discovered that he was sharing his room with a rottweiler for which he had not paid the posted $25 pet deposit. When Cochran went to Davis's room on October 25 to ask for the deposit, Davis answered the door, holding the dog by its collar. He claimed that he did not have the money, but that his girlfriend's relative would pay. But the motel did not receive the deposit.

At 11:00 the next morning, Cochran telephoned Davis to inquire about the pet deposit and to determine whether he intended to stay another night. Davis did not

answer. Cochran then knocked on the door of his room. Although the inside dead-bolt lock was secured, no one answered.

The motel's head housekeeper, Shirley Toulou, testified that shortly after noon on October 26, her cleaning staff reported that Davis's room was still occupied. Because it was after check-out time, Toulou, following motel policy, asked the front desk to call Davis to inquire whether he intended to stay another night. When Davis did not answer the call, Toulou knocked on the door and identified herself. When there still was no answer, Toulou asked Cochran to call 9-1-1. Toulou testified that she asked Cochran to make the call "to see what [was] going on in the room, if there is a death or--you know, because we have had that problem before."

Sergeant Lyon and Officer Brimmer arrived at the motel at approximately 12:20 P.M. Toulou and Cochran explained that the room appeared to be occupied, but that no one responded to their repeated attempts to make contact by telephone and in person. They said that they were concerned for the occupants' safety, but did not want to investigate by themselves because they were afraid of the dog.

Sergeant Lyon went to the motel room door and found the dead bolt partially engaged. He knocked loudly, identifying himself as a police officer. No one responded, but Lyon heard a dog sniffing on the other side of the door. Sergeant Lyon, recalling an earlier occasion when he had entered an unresponsive motel guest's room and found the guest in need of medical attention due to a drug overdose, was concerned.

Believing that the room's occupant might need medical assistance, Sergeant Lyon used a pass key to open the door. When there was no response to his loud call, he and Officer Brimmer entered the room. They found Davis and a minor female, E.S., in separate beds. They also observed "numerous homemade pipes, bongs, and plastic tubing, and a black tray with lines of white powder."

When the officers' attempts to arouse Davis and E.S. verbally were unsuccessful, Officer Brimmer woke Davis by shaking him. E.S. woke moments later. The officers then explained the reason for their presence and asked Davis and E.S. for consent to search the room. E.S. consented immediately. Davis initially refused, claiming that he lacked authority because the room was in Shad Bruce's name, but withdrew his objection when motel employees confirmed that Davis fit Shad Bruce's description. He and E.S. then signed written consent forms.

During the search, the officers found drug paraphernalia, rock cocaine, and a loaded handgun. They also found used videotapes and a video camera aimed at the bed. The videotapes documented Davis, E.S. and another female smoking drugs and Davis loading and aiming a handgun at E.S.'s head.

Based on this evidence, the State charged Davis with the instant offenses. Davis moved to suppress the evidence. In denying the motion, the trial court relied upon two alternative grounds. First, it concluded that the officers' entry into Davis's motel room fell within the medical emergency exception to the warrant requirement. Second, it found that Davis did not have a reasonable expectation of

privacy in the room because his tenancy had expired before the police entered. A jury then convicted Davis as charged.

ISSUES AND RULINGS: (1) Did Davis have a reasonable expectation of privacy in the motel room? (ANSWER: Yes); (2) Did the officers have an objectively reasonable justification for an emergency-based forcible entry of the motel room? (ANSWER: Yes); (3) Did the written consent to search authorize the officers to view the videotape? (ANSWER: Yes); (4) Did the prosecution of Davis following forfeiture proceedings on the same incident violate constitutional double jeopardy protections? (ANSWER: No) Result: Affirmance of Thurston County Superior Court convictions for controlled substances, firearms, and witness tampering offenses.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) REASONABLE PRIVACY EXPECTATION

Generally, a motel guest has the same expectation of privacy during his tenancy as the owner or renter of a private residence. This expectation, however, does not survive the expiration of the tenancy, unless the motel has accepted late payment and/or tolerated overtime stays in the past.

Here, the warrantless entry occurred less than an hour after the noon check-out time. But the motel had previously accepted rental payments from Davis at least three hours late and had tolerated his overstays. Under these circumstances, we find that Davis had a reasonable expectation of privacy in his room at the time the police entered.

(2) EMERGENCY ENTRY

The medical emergency exception allows a police officer to enter a dwelling without a warrant for purposes of rendering emergency aid and assistance to a person he reasonably believes is in need of such assistance. But the State must prove that (1) "the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched." Further, the officer must " 'be able to point to specific and articulable facts' " and reasonable inferences drawn therefrom, that provide reasonable justification for the warrantless entry.

Davis limits his challenge to the second prong of the test--whether the officers had an objectively reasonable belief that there was an emergency. We conclude that the totality of the evidence was sufficient to create an objectively reasonable belief that there was an emergency situation: (1) the dead bolt to Davis's standard motel room was activated from the inside, (2) the occupant did not respond to repeated telephone calls and knocks at the door throughout the late morning and early afternoon of October 26, and (3) it was after check-out time. These facts and the rational inferences one can draw from them support the reasonable conclusion that the occupant of Davis's motel room may well have needed immediate medical attention.

(3) CONSENT SCOPE

The scope of a consent search is limited by the authority granted by the consenting party.

Here, Davis's written consent form provided, in pertinent part,

> Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at 4615 Martin Way 207[.]
> The above said officer(s) further have my permission to take from my premises and property any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.

By signing this document, Davis expressly granted to the police the authority to search and seize virtually any materials they reasonably believed to be evidence of criminal activity. Further, there is no evidence in the record supporting Davis's contention that he limited the scope of his consent to only those materials the officers could see without the benefit of a video player. Given other evidence of illegal activity in the room, the officers reasonably believed that the videotapes might contain incriminating images. They did not exceed the scope of the written consent when they seized the tapes and viewed their contents.

(4) DOUBLE JEOPARDY

Finally, Davis claims that the State violated his constitutional rights against double jeopardy by bringing criminal charges after it had already punished him once through civil forfeiture proceedings. But the United States Supreme Court has clarified that civil forfeitures do not constitute "punishment" for purposes of double jeopardy analysis unless they are " 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding." Accordingly, criminal prosecution after a civil forfeiture of property generally does not constitute double jeopardy. Ursery [U.S. v. Ursery, 135 L.Ed. 2d 549 (1996) **Aug '96 LED:11**] applies with equal force under state constitutional analysis.

[Some citations omitted]

EMERGENCY JUSTIFIES SEARCH OF HOME FOR DRUGS FOLLOWING MOM'S OD

State v. Angelos, ___ Wn. App. ___ (Div. I, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Officer Richard Isaacson of the Everett Police Department arrived at Angelos' home at the same time as aid personnel from the Everett Fire Department and entered the apartment with them. Other medical personnel were already treating

Angelos on her living room floor. Officer Isaacson did not provide aid to Angelos, but overheard her tell the medical technicians that she had ingested cocaine through her nose, and that her 12-year-old daughter was also in the home with two friends. The officer found the three girls in the daughter's bedroom.

Officer Isaacson explained to the daughter that the medics were there because her mother had taken an overdose of cocaine. She told him that she felt her mother had a prescription drug problem. Officer Isaacson asked her to look and see if any drugs had been left around. She did so and returned saying that she had found something in the bathroom. She then took Officer Isaacson into the bathroom, where he found a line of cocaine beside the sink.

The State charged Angelos with possession of cocaine. After the trial court denied her motion to suppress, she proceeded to a bench trial and was convicted on stipulated facts.

ISSUE AND RULING: Was the officer's search of the home for drugs justified under the emergency exception to the search warrant requirement? (ANSWER: Yes) Result: Affirmance of Snohomish County Superior Court conviction for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

This state recognizes a medical emergency exception to the Fourth Amendment warrant requirement. The medical emergency exception has been applied in various circumstances where police were carrying out what the Supreme Court described in Cady v. Dombrowski, 413 U.S. 433 (1973), as "community caretaking functions".

The search in this case is distinguished from an investigative search. An investigative search is not a community caretaking function that will justify a warrantless search. The purpose of an investigative search is to determine if a crime has been committed, and under the Fourth Amendment the assessment of whether there is probable cause for such a search must--in the absence of an exception to the warrant requirement--be made by a neutral and detached magistrate.

When the use of the emergency exception is challenged on appeal, the reviewing court must satisfy itself that the claimed emergency was not simply a pretext for conducting an evidentiary search. To satisfy the exception, the State must show that the officer, both subjectively and objectively, "is actually motivated by a perceived need to render aid or assistance."

As to the subjective element, the trial court here found, based on Officer Isaacson's testimony, that the "officer was concerned for the safety of the girls with drugs in the apartment and he was also concerned about the possibility that the defendant might have taken prescription drugs in conjunction with the cocaine."

Angelos contends that Officer Isaacson's actions were not consistent with a perceived need to render assistance. She points out that the officer did not look any further once he discovered the cocaine. This, she argues, is inconsistent with

his perceived need to search for, and report to the hospital, any prescription drugs that Angelos may have swallowed in conjunction with the cocaine. We agree that his conduct is not entirely consistent with that claimed motive. But his conduct is entirely consistent with the officer's primary motive of protecting the three girls. Because the officer knew the mother had just overdosed, his immediate concern that drugs of some kind might be lying about in easy reach was fully justified.

Angelos argues that Officer Isaacson's entries into the house and bathroom were not objectively reasonable because of the presence of better-trained medical personnel who did not indicate a need to search for drugs. Police presence may not be as crucial as that of the medically-trained personnel, but it certainly can be useful in coping with any circumstances, such as the presence of youngsters, that might otherwise be distracting to the medical technicians. The fact that his services might reasonably be needed inside objectively justifies Officer Isaacson's entry into Angelos' home.

The fact that the officer had valid reasons for entering the apartment does not justify his further entry into the bathroom once he found that Angelos was being capably treated by medical personnel. But at this point the officer learned of the presence of the girls. The emergency nature of each situation must be evaluated on its own facts, and in relation to the scene as it reasonably appeared to the officer at the time. The entry into the bathroom to search for drugs that might present a safety hazard to the children was objectively reasonable under the circumstances presented in this case.

[Some citations omitted]

NO "SEIZURE" IN OFFICER'S ACT OF SHINING SPOTLIGHT ON POSSIBLE SUSPECT; HODARI D. RULE APPLIED WHERE SUSPECT DID NOT SUBMIT TO AUTHORITY

State v. Young, ___ Wn. App. ___ (Div. II, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

On August 24, 1994, Pierce County Deputy Sheriff Robert Carpenter was on patrol in Tacoma. At approximately 9:40 p.m., the deputy saw Young standing at the corner of Chicago and Lincoln Avenue SW, an area known for high drug activity.

Although the deputy did not find Young's activity suspicious, he made "social contact" with Young and asked him his name. As the deputy drove away, he requested a computer criminal records check and discovered that Young had an extensive criminal background involving drugs. In his rear view mirror, the officer then observed Young walk to the middle of the street, as if to see if the deputy was leaving.

The deputy turned his patrol car around and drove back toward Young. As he approached, the deputy activated the car spotlight, illuminating Young and the surrounding area. Young walked rapidly toward some trees, tossed "an apparent

> package or something" behind a tree, walked quickly away from the trees, and then resumed a normal walk down the sidewalk.
>
> Believing that Young was involved in drug related activity, or at least littering, the deputy detained Young and retrieved the object. The deputy recovered a half soda can charred on the bottom and containing a hard, crystallized, tan substance. Based upon his experience, the deputy believed that this substance was "freebased" crack cocaine.
>
> The officer arrested and searched Young and found a copper colored pipe and a lighter. Young was charged with the unlawful manufacturing of an imitation controlled substance under RCW 69.52.030(1).
>
> Young was charged under the "imitation controlled substances" statute because laboratory tests after the arrest concluded that the substance in the can was not a controlled substance, but rather was made from powdered Vitamin B.
>
> Young moved under CrR 3.6 to suppress all evidence gained from the arrest. The trial court granted Young's motion, finding that Young was "seized at the point that the deputy illuminated [him] with the spotlight." The trial court also found that at the time of Young's "seizure," the deputy did not have a reasonable articulable suspicion to believe Young was involved in criminal activity. Thus, the trial court reasoned, the seizure was improper and all evidence discovered as a result of the detention was deemed inadmissible.

ISSUE AND RULING: Was Young "seized" for Fourth Amendment purposes, or for purposes of article 1, section 7 of the Washington State constitution, when the officer shined the spotlight on him? (ANSWER: No) Result: Reversal of Pierce County Superior Court suppression order; case remanded for trial.

ANALYSIS:

In significant part, the Court's Fourth Amendment analysis is as follows:

> Fourth Amendment protection is implicated only when an encounter between a police officer and a citizen rises to the level of "seizure." A person is "seized" within the meaning of the Fourth Amendment "when, by means of physical force or a show of authority, his freedom of movement is restrained [and] ... in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave." The burden of proving a seizure occurred is upon the accused.
>
> Examples of a seizure include the threatening presence of several officers, the display of a weapon by an officer, physical touching of an individual, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled…In a situation in which the officer does not physically touch the suspect, the suspect is not seized until he or she submits to the officer's show of authority. [Calif. v. Hodari D., 499 U.S. 621 (1991) **July '91 LED:01**]

> Thus, not every encounter between a police officer and a citizen constitutes a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. In the present case, Young was not seized by the deputy's initial "social contact," and Young was seized when the deputy finally ordered him to stop and he complied with that command. The question is whether Young was seized before the final stop, at the point the officer illuminated him with the spotlight.
>
> As an initial matter, we note that whether a deputy's use of a spotlight alone constitutes a seizure has not been addressed in Washington. We hold that the illumination of Young was not a seizure under the Fourth Amendment. Although the light may constitute a show of authority, Hodari D. requires submission to that show of authority. Here, after the deputy illuminated Young, Young walked quickly to a stand of trees, disposed of his package, and continued to walk down the street. He did not stop walking until the deputy ordered him to stop. See Hodari D., (holding that even though police chased suspect on foot for a significant distance, no seizure occurred until officers physically restrained him). Thus, Young was not seized until he submitted to the officer's command to stop.
>
> As there was no seizure until Young complied with the officer's order to stop, the deputy properly retrieved the charred can as voluntarily abandoned property, and there was no violation of Young's Fourth Amendment rights. Discarded property is voluntarily abandoned unless there is unlawful police conduct, and a causal nexus exists between that conduct and the abandonment.
>
> Police officers may make investigatory, or Terry, stops without probable cause if they have a reasonable articulable suspicion of criminal activity, and they may stop a person, ask for identification, and an explanation of the person's activities. Here, the deputy did not have a reasonable articulable suspicion of criminal activity until after Young dropped the can. Young's conduct at that point was highly indicative of drug activity. Therefore the deputy properly detained Young. The trial court erred in excluding the evidence under the Fourth Amendment.

[Some citations omitted]

After analyzing the Fourth Amendment issue, the Court of Appeals turns to the Washington constitution, article 1, section 7. Article 1, section 7 has been interpreted in certain circumstance to provide greater privacy protection than the Fourth Amendment. However, here, after thorough review, the Court of Appeals concludes the rule of Hodari D., applies under both state and federal constitutional analysis. Because Young had not complied with the officer's directive when he discarded the cocaine, Young had not been "seized" at the point, and the cocaine was admissible as evidence under both the state and federal constitutions.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) INFANCY DEFENSE – RCW 9A.04.050 PRESUMPTION OF NONCRIMINALITY FOR CHILDREN BETWEEN 8 AND 12 GETS PRO-DEFENSE READING IN SEX OFFENSE CASES – In State v. James P.S., 85 Wn. App 586 (Div. III, 1997) and State v. Erika D.W., 85 Wn. App.

601 (Div. III, 1997), the Court of Appeals for Division Three gives a broad pro-defense interpretation to the proof requirements of RCW 9A.04.050, which provides that children from the age of 8 and under 12 are presumed incapable of committing a crime.

Facts in the two cases

In the James P.S. case, the accused was an 11-year-old boy who was marginally mentally retarded. James had been adjudicated guilty in juvenile court of first degree rape of a child based on his acts of touching a 3-year-old girl's vagina with his finger and slightly penetrating her vagina with his penis.

In the Erika D.W. case, the accused was an 11½-year-old girl who was of above-average intelligence. Erica D.W. was adjudicated guilty in juvenile court of first degree child molestation based on her act or acts of touching a 6-year-old's vagina with her finger.

Analysis in the two cases

Under RCW 9A.04.050, to overcome the presumption that a child at or over the age of 8 and under 12 is incapable of committing any crime, the prosecution must prove that the child had sufficient capacity to understand the act and to know that it was wrong. Testimony on the question of criminal capacity in each of these cases came from, among others, the accused child's immediate family, school personnel, and investigators.

The Court of Appeals begins its legal analysis in each of these cases with a general statement regarding the determination of criminal capacity under RCW 9A.04.050:

> The determination of capacity must be made in reference to the specific act charged and is necessarily fact-specific. In addition to the nature of the crime, other elements may be relevant in determining whether the child knew the act was wrong: (1) the child's age and maturity; (2) whether the child exhibited a desire for secrecy; (3) whether the child admonished the victim not to tell; (4) prior conduct similar to that charged; (5) any consequences that attached to that prior conduct; and (6) acknowledgment that the behavior is wrong and could lead to detention.

[Citations omitted]

The **James P.S.** opinion then explains why the evidence in this case does not establish criminal capacity for James P.S.:

> First degree rape of a child requires proof that the offender committed an act of sexual intercourse on a child younger than 12 years old and more than 24 months younger than the offender. RCW 9A.44.073(1). Consequently, the specific act James must have understood is sexual intercourse. Ms. Texeira- Zike testified that James knew the names of the sexual organs but did not understand what rape meant. James's teacher and principal testified that the reproductive process and inappropriate touching were taught at school, but they could not prove James had attended these lessons (in light of the fact that he was pulled from regular classes almost one-half of each school day), and the teacher noted they did not discuss the appropriateness of sexual activity. On balance, it is not clear that James understood his conduct manifested sexual intercourse.

> The crucial question, however, is whether James knew his conduct was legally wrong. The trial court found that James exhibited knowledge that his act was wrong when he showed a desire for secrecy (taking M. to an abandoned shack, pulling up his pants when M.'s brother entered and telling him to go away, and lying about being with M. that day) and when he declared at the end of his recorded statement that his behavior was wrong. While it is "intuitively obvious" from this evidence that James knew exposing and touching private areas were wrongful, it is less obvious that he knew he would suffer societal consequences such as juvenile detention.
>
> Contributing to the difficulty in showing James understood the wrongfulness of his conduct is the fact that he is marginally mentally retarded. Although he acknowledged what he did was wrong, this statement was made after he had been interviewed twice earlier. Clearly, by this time he had discovered that his conduct was wrong. [See State v. K.R.L., 67 Wn. App. 721 (Div. III, 1992) **June '93 LED:11]** (a child who confessed after a beating had been "conditioned" to know that what he did was wrong)].
>
> Linares [See State v. Linares, 75 Wn. App. 404 (Div. I 1994) **Sept. '95 LED:16**] recognized that the State carries a greater burden when it has to prove a child appreciates the wrongfulness of certain sexual acts. The State must prove the child not only understood the nature of the act, but that it was punishable in court. That burden was not met here with clear and convincing evidence.

[Footnotes and some citations omitted]

The **Erika D.W.** opinion explains why the evidence in her case does not establish criminal capacity for Erika D.W.:

> First degree child molestation requires proof that the offender had sexual contact with a child younger than 12 years old and more than 36 months younger than the offender. RCW 9A.44.083(1). The specific act Erika must have understood is sexual contact, defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Even if we assume Erika learned in school and at home that certain kinds of touching were inappropriate, it is far from clear she knew that one could touch a younger child to gratify sexual desire. There was no testimony that she had learned anything about sexual desire--a sophisticated concept for a preadolescent. Without such testimony, the evidence is not clear or convincing that Erika understood the nature of the act.
>
> Additionally, the evidence is not sufficient to show that Erika knew her conduct was legally wrong. Her recorded statement reveals nothing more than her attempts to remember something that could have been interpreted as improper touching. It is not unreasonable for a child suspect to feel guilt simply because he or she is being formally questioned by the police. The relevant question is whether Erika understood the gravity of her conduct. As noted in [State v. Linares, 75 Wn. App. at 404 (Div. I 1994) **Sept. '95 LED:16**] the State carries a greater burden when it has to prove a child appreciates the illegality of certain sexual acts. The element

> of sexual desire in child molestation makes it one of those sexual acts requiring a higher degree of proof.
>
> In short, the evidence in this case sheds little light on Erika's understanding of the nature of her alleged act or its legal consequences. Consequently, we find that the State failed to rebut the presumption of incapacity with clear and convincing evidence.

[Footnotes, some citations omitted]

Results: Reversal of Yakima County Superior Court rulings on criminal capacity of J.P.S. and E.D.W. and on their adjudications for juvenile offenses; charges dismissed.

(2) "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE PASSES STATE CONSTITUTIONAL TEST – In State v. Richman, 85 Wn. App. 568 (Div. I, 1997), the Court of Appeals for Division One upholds the constitutionality under state law of the "inevitable discovery" exception to the exclusionary rule.

A police officer had responded to a store security person's request to police for assistance with Allen Richman, a suspected shoplifter. When the officer arrived, the officer learned that the security person had observed apparently stolen merchandise on the person of the suspect. The officer made the same observation. At some point after the officer's arrival, the officer seized and searched a briefcase in the suspect's possession, finding more stolen merchandise.

The critical issue in the subsequent suppression motion in superior court was whether the briefcase had been searched "incident to Richman's arrest." The issue was critical because the value of the items in the briefcase, when added to the value of the items which had been observed in plain view prior to the briefcase search, was sufficient to push Richman's theft from second degree to first degree. The trial court had concluded that, due to the officer's inability to remember the exact sequence of events, the trial court could not determine whether Richman had been arrested before or after the briefcase was searched, thus making it difficult to determine whether the briefcase search was clearly "incident to arrest."

However, the Court of Appeals declares, the timing of the briefcase search was irrelevant in light of the "inevitable discovery" exception to the exclusionary rule. Because the officer clearly had probable cause to arrest Richman long before the officer searched the briefcase, it was "inevitable" that the officer would have eventually arrested Richman. And at that point the officer would have lawfully searched Richman's person and personal effects, including the briefcase.

The Court of Appeals rejects defendant's argument that, because the Washington constitution – article 1, section 7 – generally provides greater privacy protection than does the Fourth Amendment of the U.S. constitution, the inevitable discovery exception to the Exclusionary Rule cannot be part of the Washington constitution. The Court of Appeals notes that the basis for the inevitable discovery doctrine is that the evidence would have been eventually gotten by permissible means. This leads the Richman Court to assert that there is no inconsistency with privacy protection in applying the doctrine under the state constitution.

Result: Affirmance of King County Superior Court conviction for first degree theft.

(3) "FELONY ELUDING" STATUTE REQUIRES PROOF PURSUING OFFICERS IN UNIFORM -- In State v. Hudson, 85 Wn. App. 401 (Div. I, 1997), the Court of Appeals for Division One once again reverses a "felony eluding" conviction under RCW 46.61.024 on grounds that the State failed to prove that the pursuing officers were in uniform.

RCW 46.61.024 provides:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

In Hudson, as in State v. Fussell, 84 Wn. App. 126 (Div. I, 1996) **April '97 LED:19**, the State failed to present evidence at trial to establish that any pursuing officer was in uniform. In the absence of such proof, a felony eluding conviction cannot stand, the Court of Appeals holds.

Result: Affirmance of King County Superior Court conviction.

(4) "FELONY ELUDING" CHARGE STANDS EVEN IF PURSUIT INITIATED WITHOUT CAUSE -- In State v. Duffy, 86 Wn. App. 334 (Div. III, 1997), the Court of Appeal reverses a trial court order which had dismissed felony eluding charges on grounds that the pursuing officer had lacked sufficient cause to pursue the defendant's vehicle. The Court of Appeals explains:

> The State contends the order dismissing the eluding charge is based on the erroneous assumptions the officer's signal to stop must be legally correct and Mr. Duffy's response to an alleged improper seizure can be suppressed as fruit of an unlawful seizure. The State asserts the issue of whether or not the officer had probable cause to stop Mr. Duffy is irrelevant because RCW 46.61.024 does not mandate that the attempted stop be legal. Moreover, public policy does not permit an illegal response to an alleged illegal seizure.
>
> To convict a defendant of the crime of attempting to elude, three elements must be shown to have occurred in the proper sequence. The sequence of events must be as follows:
>
> > The first element is that a uniformed police officer whose vehicle is appropriately marked must give the potentially errant driver of a motor vehicle "a visual or audible signal to bring the vehicle to a stop ..." Next, the driver must be a person who "willfully fails or refuses to immediately bring his vehicle to a stop ..." The willful failure to do so implies knowledge that a signal has been given. The third element is that, "while attempting to elude a pursuing police vehicle," the driver "drives his vehicle in a manner indicating a wanton and [or] willful disregard for the lives or property of others ..." All three elements must occur in sequence before the crime has been committed.

> "[T]he issue under RCW 46.61.024 is the nature of the defendant's behavior after the police initiate a stop, not whether the officer has authority to make the stop." Police power may lawfully extend to prohibit flight from an unlawful detention where that flight demonstrates a wanton and willful disregard for the life and property of others. "The constitutional right to be free from unreasonable searches and seizures does not create a constitutional right to react unreasonably to an illegal detention."

In [State v. Malone, 106 Wn.2d 607 (1986) **Nov. '86 LED:**01], the court reversed the dismissal of attempting to elude charges finding that RCW 46.61.024 did apply when the pursuing police vehicle belonged to an Idaho officer who had no authority to make an arrest in Washington. In several decisions prior to the Malone decision, courts had upheld the constitutionality of this statute finding that RCW 46.61.024 punished unreasonable conduct rather than constitutionally protected behavior. All of the courts addressing this issue were concerned with the safety of police officers and the public if individuals were permitted to flee from legal or illegal stops with wanton or reckless disregard.

The trial court erred when it dismissed the charge of attempting to elude based on its finding there was no probable cause for the initial stop. The court should have focused its attention on the conduct of Mr. Duffy in response to the stop and not whether there was probable cause to support an arrest pursuant to RCW 46.61.024. The lower court erred in requiring the State to show probable cause for the initial stop.

[Most citations omitted]

Result: reversal of Spokane County Superior Court order dismissing felony eluding charges; case remanded for trial.

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TRAINING COMMISSION WORLD WIDE WEB HOME PAGE

Ian Wallace of the Criminal Justice Training Commission announced last month that the Training Commission now has an Internet "Home Page" on the World Wide Web (WWW). This home page contains information such as:

- Schedule of Classes (from each month's training update)
- Special Events (other courses, seminars not necessarily WSCJTC sponsored)
- Law Enforcement Digest (all of 1996, 1997 up to current issue)
- Regional Training Representatives (Seattle Training)
- Staff Roster
- Employment Opportunities (same as in each LED)
- BAC Class Schedule

The Internet address for the home page is: **http://www.wa.gov/cjt**

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NEXT MONTH

In last month's **LED** at pages 14-15, we discussed the Ninth Circuit decision in Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) in which that Federal court held that a certain level of notice was required regarding the right to seek return of property seized in a search warrant execution. We had hoped to provide a sample notice this month which would address the Perkins' Court's concerns. However, at **LED** deadline for this month, we were still studying the issue. We should have a sample notice for next month's **LED.**

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.